

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A. O. NO. 322 OF 2006

The Juhu Vile Parle Development
Cooperative Housing Association Ltd. .. Appellant

vs.

Municipal Corporation
of Greater Mumbai Respondent

Mr. D.S. Parekh with R. Poojari i/b.
Mahenor Thakkar for appellant.
Mr. J. Rais with Ms. Geeta Joglekar for BMC.

CORAM: D. G. KARNIK J.

DATE: December 13, 2006

P.C.

1. Heard learned counsel for the parties.
2. This appeal filed by the appellant (original plaintiff) is directed against the order dated 31st November 2005 passed by the learned Judge of the City Civil Court at Mumbai, rejecting his motion for interim injunction.
3. The appellant and other 14 cooperative housing societies

were the owners of the suit property which is a plot of land measuring 53,978 sq. meters. There were negotiations between the owners of the suit property and the Mumbai Municipal Corporation, the respondent herein, under which the appellant and other cooperative societies agreed to give to the respondent the suit property at the concessional rate of Rs.11 per sq. yard, subject to certain terms and conditions which inter alia included that the respondent would prepare sewerage, roads and would provide water and street lights to the other land of the societies. In addition it was also agreed that the respondent would provide a vegetable market and shops in an area of about 2.7 acres. In pursuance of the said negotiations the appellant and other cooperative societies handed over possession of the suit property to the respondent under a letter on 1st December 1961. A copy of the letter is at exhibit "C" of the memo of appeal. The said letter was signed by the president of the appellant on behalf of all the societies and by S.M. Postwala , Executive Engineer (Estate & Land Manager) on behalf of the respondent. However, it does not bare the signature of the Commissioner nor the seal of the Corporation.

4. It appears that though the possession of the suit property was handed over to the respondent the legal ownership was never transferred, inasmuch as neither a deed of conveyance

nor a deed of lease nor any other of the registered instrument of transfer was ever executed between the parties. Some correspondence was exchanged between the parties under which the modalities of the transfer were considered but as the stamp duty for effecting the transfer was very high actual transfer was never effected.

5. The respondent thereafter constructed a municipal hospital known as “Dr. R. N. Cooper Hospital” which occupies a substantial portion of the suit land. In May 1995 a public notice was issued by the respondent inviting offers from private entrepreneurs for redevelopment of “R. N. Cooper Hospital”. The public notice states that the Corporation would grant the right of redevelopment of the property to the private entrepreneurs in consideration of his construction for the Corporation the main hospital building with facility of 520 beds; as a consideration the private entrepreneurs would be allowed to redevelop the remaining portion and construct private hospital which can be used by him. On publication of the notice in the newspapers the appellant rushed to the court and filed a suit for injunction restraining the Corporation to redevelop the suit property . In the suit the appellant took out a motion praying for an injunction restraining the respondent from selling, encumbering, transferring, alienating , or dealing with the suit property or

entrusting the development rights in respect thereof to third persons as proposed in the public notice. The trial court initially granted ad interim injunction in the motion. However, on hearing, the trial court dismissed the motion and vacated the injunction by its order dated 30th November 2005. That order is impugned in this appeal.

6. Learned counsel for the appellant submitted that there were only negotiations between the parties regarding the transfer of ownership of the suit property. In pursuance of the said negotiations possession was handed over to the respondent. However, the ownership was never transferred to the respondent and therefore the appellant continues to be the owner of the suit property. Since the appellant is the legal owner the respondent is not entitled to invite a tender for redevelopment of the property without the appellant's consent. He therefore submitted that the appellant is entitled to an injunction.

7. Mr. Rais learned counsel for the respondent submitted that in pursuance of the negotiations, not only the possession was handed over to the respondent but respondent has also paid the entire agreed consideration at the rate of Rs.11/- per sq. meter. The respondent has also performed its part of constructing the sewerages, roads etc., as mentioned in the

letter of possession dated 1st December 1961. He therefore submitted that the ownership of the property stands transferred to the respondent.

8. Mr. Rais further submitted that immovable property can be acquired by the Municipal Corporation by private agreement as provided under section 90 of the Mumbai Municipal Corporation Act (for short the MMC Act). Where the acquisition is not possible by a private agreement the Municipal Corporation is entitled to acquire the property under section 91 of the MMC Act by following the procedure prescribed by law. In the present case, the property was acquired by a private agreement under section 90. He further submitted that as the possession was handed over to the respondent in pursuance of the private agreement the property stood vested in the respondent by operation of law.

9. In order to consider the submission of Mr. Rais it would be appropriate to refer to section 90 of the MMC Act which reads as follows:

“90. Acquisition of immovable property by agreement:

(1) Wherever it is provided by this Act that the Commissioner may acquire or whenever it is necessary or expedient for any purpose of this Act

that the Commissioner shall acquire, any immovable property, such property may be acquired by the Commissioner Commissioner on behalf of the corporation by agreement subject to the provisions of sub -section (3).

(2) And whenever, under any provision of this Act, the Commissioner is authorized to agree to pay the whole or any portion of the expenses of acquiring any immovable property, he shall do so on such terms and at such rates or prices or at rates or prices not exceeding such maximum as shall be approved by the Improvements Committee as aforesaid.

(2A) Subject to the provisions of this Act, it shall be lawful for the Commissioner on behalf of the corporation to agree with the owner of any land or of any interest in land needed by the corporation for the purposes of any scheme under Chapter XII-A or with the owner of any right which may have been created by legislative enactment over any street forming part of the land so needed, for the purchase of such land or of any deprivation thereof or interference therewith.

(3) No contract for the acquisition of any

immovable property or of any interest therein or any right thereto or the payment of any compensation under sub- section (1) or (2) or (2A) shall be valid, if the price or compensation to be paid for such property or interest or right exceeds five lakh rupees such contract has been approved by the Improvements Committee; and by the Corporation if the price or compensation exceeds rupees two crore;

(4) Every contract or other instrument relating to the acquisition of immovable property or any interest therein or any right thereto shall be executed by the Commissioner, shall have the common seal of the corporation affixed thereto in the presence of two members of the Improvements Committee and shall also have signatures of the said members in the manner prescribed in section 70.

(5) No contract for the acquisition of immovable property or any interest therein or any right thereto not executed as in sub – section (4) provided shall be binding on the corporation.

(6) The foregoing provisions of this section which apply to an original contract relating to the acquisition of immovable property, or any interest

therein, or any right thereto, shall be deemed to apply also to any variation or discharge of such contract.”

10. Sub section (1) of section 90 empowers the Commissioner to acquire any private property necessary for the purposes of the Act by a private agreement, subject to the conditions specified in sub section (3). Sub section 3 provides that the contract for acquisition of the immovable property must be in writing and where the total compensation payable exceeds Rs.5 lakhs the contract must be approved by the Improvements committee and where the prices of compensation exceeds Rs.2 crores then the contract must be approved by the Corporation itself. Sub section 4 provides that every contract or other instrument relating to the property shall be executed by the Commissioner and shall bear the common seal of the Corporation affixed thereto in the presence of two members of the Improvements Committee who are also required to sign the same in the manner prescribed by section 90. Private acquisition must be by a written agreement. The act also provides for the manner of execution of the written agreement inasmuch as it requires that the contract must be signed by the Commissioner and also by atleast two members of the Improvements Committee. Further more the contract

requires the approval of the Improvements Committee if the value of the contract exceeds Rs.5 lakhs and the Corporation itself if the contract is for more than Rs.2 crores. In the year 1961, when the property was acquired the contract required approval of the Corporation if the contract exceeded Rs. 10,000/-. It is not disputed that the contract between the appellant and the respondent was not signed by the Commissioner. The contract did not bear the seal of the Corporation nor did it bear the signatures of the two members of the Improvements Committee. Thus the contract was not in accordance with the provisions of section 90 of the MMC Act.

11. The further submission of Mr. Rais that on possession of the property being handed over to the Corporation in pursuance of the contract under section 90 of the MMC Act the ownership would automatically vest in the Corporation is fallacious. Ordinarily the law recognizes three modes of transfer of an immovable property. The first is by a contract inter vivos, the second is on death of a person by succession - testamentary or non- testamentary and third is by operation of law. In case of a transfer by operation of law the ownership of the property is transferred from one person to another or to the State in the manner provided by the statute. For example, under the Land Acquisition Act the

ownership of a property is transferred under section 16 of the Land Acquisition Act when the Collector takes possession after an award under section 11. No further document is necessary in such a case. In case of death of the owner the transfer takes place by succession, testamentary or non-testamentary, and the ownership is transferred immediately after death though the testamentary instrument may be required to be proved in accordance with law. Private transfer of an immovable property valued upwards Rs.100/- can however, take place only by means of an instrument duly registered as provided under section 17 of the Indian Registration Act. In the present case the respondent claims that the ownership was transferred to it by a private contract. Such a private transfer can only take place by a registered instrument. Section 90 or any other provision of MMC Act does not contemplate transfer of any immovable property merely on execution of the contract or merely on delivery of possession. In my view, therefore, the appellant continues to be the legal owner of the suit property. The ownership vests in the appellant though the respondent may be in lawful possession of the property.

12. Learned counsel for the appellant referred to the decision of this court in *Jalan Trading Co. Pvt. Ltd. vs. The State of Maharashtra and ors.*, reported in AIR 1971 Bom. 196 and

submitted that the Corporation is entitled to acquire the immovable properties by two methods one by private transfer and other by compulsory acquisition. There is no dispute that section 90 of the MMC Act enables the respondent to acquire immovable property by private contract without being required to follow the procedure under the Acquisition Act. But the question is not whether the Corporation has power to acquire the property under section 90 but whether it has acquired the suit property and the legal ownership has vested in it. On the facts of the case it must be held that the respondent has at the most agreed to acquire the suit property under section 90. The contract however, does not appear to be in accordance with the procedure laid down by section 90. In any case the ownership of the property has not yet been transferred to the respondent.

13. In my view, therefore, the appellant has made out a prima facie case that it is the legal owner of the property. The appellant is therefore entitled to an injunction during the pendency of the suit. For these reasons the appeal is allowed and respondent is restrained by an order of injunction from redeveloping the suit property without prior permission of the respondent and until the ownership of the property is actually transferred to it.

Learned counsel for the appellant prays for stay of the

order. In my view granting of stay would defeat the very purpose of injunction as the respondent may transfer the property to a third person. Hence request for stay is rejected.

(D.G. KARNIK J.)